Nos. 98-791, 98-796

IN THE

Supreme Court of the United States

J. DANIEL KIMEL, JR., *et al.*,
Petitioners,

v.

STATE OF FLORIDA BOARD OF REGENTS, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FLORIDA BOARD OF REGENTS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONERS J. DANIEL KIMEL, JR., *ET AL.*

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QUESTION PRESENTED

Whether the Eleventh Amendment bars a private suit in federal court against a State for violation of the Age Discrimination in Employment Act.

PARTIES

Petitioners in No. 98-791 were the plaintiffs in three separate cases which were consolidated for argument and decision by the Court of Appeals:

Burton H. Altman, Robert W. Beard, Vandall K. Brock, John D. Calman, Elaine D. Cancalon, Siwo De Kloet, Joseph F. Donoghue, Ralph C. Dougherty, Phillip E. Downs, Richard M. Dunham, Robert L. Fulton, Alice C. Gaar, Richard E. Glick, Bruce T. Grindal, William H. Heard, Richard L. Iverson, Herman G. James, Jr., J. Daniel Kimel, Jr., Philip Lazarus, William E. Leparulo, Winston W. Lo, Deborah B. Maher, Richard N. Mariscal, Ronald W. Martin, Charles G. MacDonald, Robert R. Mead-Donaldson, Connie G. Morris, Sharon E. Nicholson, Lucia Patrick, Joseph J. Pettigrew, Jr., John R. Quine, Katherine M. Shelfer, Jerome H. Stern, Richard P. Sugg, Charles W. Swain, and Edward D. Wynot, Jr., plaintiffs-appellees in *Kimel v. Florida Board of Regents*, No. 96-2788 (11th Cir.).

Wellington N. Dickson, plaintiff-appellee in *Dickson v. Florida Department of Corrections*, No. 96-3773 (11th Cir.).

Roderick MacPherson and Marvin Narv, plaintiffs-appellants in *MacPherson v. University of Montevallo*, No. 96-6947 (11th Cir.).

The petitioner in No. 98-796 is the United States. The United States also is a respondent in No. 98-791.

The other Respondents in both cases are the Board of Regents of the State of Florida, defendant-appellant in *Kimel v. Florida Board of Regents*; Florida Department of Corrections, Jackson County, defendant-appellant in *Dickson v. Florida Department of Corrections*; and the University of Montevallo, defendant-appellee in *MacPherson v. University of Montevallo.*

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 139 F.3d 1426, and is reprinted in the Appendix to the Petition for Certiorari in No. 98-791 ("Pet. App.") at 1a. The opinion of the United States District Court for the Northern District of Florida in *Kimel v. State of Florida Board of Regents* is unreported and is reprinted at Pet. App. 51a. The opinion of the United States District Court for the Northern District of Florida in *Dickson v. Florida Department of Corrections* is unreported and is reprinted at Pet. App. 57a. The opinion of the United States District Court for the Northern District of Alabama in ***MacPherson v. University of***

Montevallo is reported at 938 F. Supp. 785, and is reprinted at Pet. App. 61a.

JURISDICTION

The panel opinion of the Court of Appeals was issued on April 30, 1998. Timely petitions for rehearing and suggestions for rehearing *en banc* were denied on August 17, 1998. Pet. App. 70a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subject of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> Section 1. No State shall . . . deny to any person within its juridsiction the equal protection of the laws.
>
> * * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Age Discrimination in Employment Act is codified at 29 U.S.C. §§ 621-634, and is reprinted at Pet. App. 73a-107a.

STATEMENT OF THE CASE

Petitioners are plaintiffs in three otherwise unrelated federal lawsuits, consolidated for decision in the Court of Appeals, each of which alleges, *inter alia*, that the plaintiffs' employers—agencies of State governments—discriminated against them on the basis of age in violation of the

Age Discrimination in Employment Act ("ADEA" or the Act"), 29 U.S.C. § 623.[1]

1. *Statutory Framework*

"The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995). Designed to combat "pervasive discrimination against the elderly," *Johnson v. Mayor and City of Baltimore*, 472 U.S. 361, 369 (1985), stemming from "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "[t]he ADEA broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978). *See also EEOC v. Wyoming*, 460 U.S. 226, 231 (1983).

The core provisions of the statute make it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," § 4(a)(1), 29 U.S.C. § 623(a)(1), or "to limit, segregate, or classify . . . employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of [his] age," § 4(a)(2), 29 U.S.C. § 623(a)(2).[2]

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[1] The three suits are *J. Daniel Kimel, Jr., et al. v. Florida Board of Regents*, N.D. Fla. No. TCA 95-40194 MMP ("*Kimel*"); *Wellington N. Dickson v. Florida Department of Corrections, et al.*, N.D. Fla. No. 5:96cv207-RH ("*Dickson*"), and *Roderick MacPherson, et al. v. University of Montevallo*, N.D. Ala. No. 94-AR-2962-S ("*MacPherson*").

[2] The ADEA also makes it unlawful to discriminate against an individual for having opposed practices made unlawful by, or for

The Act makes several exceptions to those basic prohibitions. An action "otherwise prohibited" by the ADEA is lawful "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." Section 4(f)(1), 29 U.S.C. § 623(f)(1). Nor does anything in the Act prevent an employer from "discharg[ing] or otherwise disciplin[ing] an individual for good cause," § 4(f)(3), 29 U.S.C. § 623(f)(3), or from "observ[ing] the terms of a bona fide seniority system that is not intended to evade the purposes of [the Act]," except to the extent that such a plan requires involuntary retirement because of age, § 4(f)(2)(A), 29 U.S.C. § 623(f)(2)(A).

The Act also expressly permits employers to differentiate between employees on the basis of age in "observ[ing] the terms of a bona fide employee benefit plan," as long as the distinctions are justified by cost or are made pursuant to "a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of [the Act]." Section 4(f)(2)(B), 29 U.S.C. § 623(f)(2)(B). Many practices that differentiate on the basis of age in connection with pension benefits, retiree health benefits, and severance pay also are expressly allowed by the Act. See § 4(i), (l), 29 U.S.C. §§ 623(i), (l).

As originally passed in 1967, the ADEA did not apply to the States or their political subdivisions, or to the Federal Government. "In a Report issued in 1973, a Senate Committee found this gap in coverage to be serious, and commented that '[t]here is . . . evidence that, like the corporate world, government managers also create

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having participated in investigations or proceedings pursuant to the statute. Section 4(d), 29 U.S.C. § 623(d). Additional prohibitions, not relevant here, appear in §§ 4(a)(3), (b), (c) and (e), 29 U.S.C. §§ 623(a)(3), (b), (c) and (e).

an environment where young is somehow better than old.' " *EEOC v. Wyoming*, 460 U.S. at 233, quoting Senate Special Committee on Aging, *Improving the Age Discrimination Law*, 93d Cong., 1st Sess., 14 (Comm. Print 1973). The Act therefore was amended in 1974 by expanding the definition of "employer" in § 11(b), 29 U.S.C. § 630(b), to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State," Pub. L. 93-259, § 28(a)(2), 88 Stat. 78, and by broadening the definition of "employee" so that public employees were no longer categorically excluded. *Id.* § 28(a)(4), 88 Stat. 74. However, persons elected to public office, the members of their personal staffs, and certain advisers, are excluded from the definition of "employee," as are policymaking appointees, unless they are "subject to the civil service laws of a State government, governmental agency, or political subdivision." Section 11(f), 29 U.S.C. § 630(f).[3] As amended, the Act also allows State and local governments to enforce maximum hiring ages and mandatory retirement ages for firefighters and law enforcement officers in many instances. *See* § 4(j), 29 U.S.C. § 623(j).

The 1974 amendments also brought federal employees under the coverage of the Act, through a separate provision which requires that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." Section 15(a), 29 U.S.C. § 633a(a).[4] Congress has extended the requirements and

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[3] The statute also permits, in both the public and private sectors, compulsory retirement of an employee over the age of 65 who holds "a bona fide executive or a high policymaking position," if the employee is entitled upon retirement to a specified level of retirement benefits. Section 12(c), 29 U.S.C. § 631(c).

[4] Certain types of federal positions, primarily in firefighting, law enforcement, and the foreign service, have been excluded from the

remedies of the ADEA to itself as well. *See* 2 U.S.C. § 1311(a)(2), (b)(2).

In the same 1974 statute that amended the ADEA to cover the States, Congress amended § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which is incorporated by reference in the enforcement provisions of the ADEA, to provide that an action may be maintained by an aggrieved employee "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." Pub. L. 93-259, § 6(d)(1), 88 Stat. 62. *See* ADEA § 7(b), 29 U.S.C. § 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section[ ] . . . 216 . . . of this title").

2. *Proceedings Below*

Petitioner Wellington Dickson was employed as a corrections officer by the Florida Department of Corrections at its Jackson Correctional Institution. His complaint alleges that upon being hired, he was told that his qualifications were such that he could expect to be promoted within six months to a year; yet, when suit was filed, he had been employed for more than five years without being promoted, while numerous younger employees who were less qualified than Dickson had been promoted. JA 86-92, 94-101, 106.[5] During that five-year period, Dickson was in his late 50s and early 60s. Dickson alleged that he had been denied promotion due to disparate treatment on the basis of his age. He also alleged that he had been subjected to retaliation for having complained to the

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ban on maximum hiring ages and mandatory retirement. *See* 5 U.S.C. §§ 3307, 8335, and *infra* note 25.

[5] Citations to " JA" are to the Joint Appendix. Citations to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari in No. 98-791.

Florida Commission on Human Relations in 1994 of the age discrimination he was experiencing. JA 92, 94-96, 106.[6]

Petitioners Roderick MacPherson and Marvin Narz were the oldest faculty members in the College of Business at the University of Montevallo, a state university in Alabama. JA 22. They filed suit alleging that their employer "has followed a continuing practice of treating younger faculty members more favorably than older faculty members," through "the denial [to the latter] of promotions, committee assignments, sabbaticals, and . . . salaries." JA 22. The complaint further alleged that the College of Business "disparately treated its older faculty members" by using "an age-based evaluation system." JA 22-23. In the district court, "[t]he University concede[d] that genuine issues of material fact exist with regards to plaintiffs' claims of ADEA disparate treatment discrimination with regards to promotions, committee appointments and sabbatical leave." JA 113. In addition to their claims of disparate treatment, MacPherson and Narz asserted ADEA claims on disparate impact, JA 22-23, 113-119, and based on allegations that they had been subjected to retaliation for having filed a previous ADEA suit that had been settled. JA 23, 119-120.[7]

Petitioners J. Daniel Kimel, Jr., *et al.*, are thirty-six current and former faculty members and librarians ("faculty members") at Florida State University ("FSU") and Florida International University ("FIU"). FSU and FIU

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[6] Dickson also asserted claims under the Americans With Disabilities Act. *See infra* note 12.

[7] MacPherson and Narz also asserted claims under the First Amendment, which were voluntarily dismissed, and claims alleging a hostile working environment, as to which the district court granted summary judgment to the defendant. Those claims are not at issue here.

are state universities. The *Kimel* plaintiffs filed suit alleging that the decision of the Florida Board of Regents not to require the payment of certain salary adjustments to senior faculty members was "an intentional act of age discrimination in violation of Section 623(a)(1) of the [ADEA]." JA 45.[8] Alternatively, the *Kimel* plaintiffs alleged that the Regents' policy of not requiring the payment of the adjustments had a disparate impact on older faculty members. JA 45.[9]

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[8] The circumstances giving rise to the claims were as follows. In 1991, the Florida Board of Regents agreed to a collective bargaining agreement under which long-term faculty members would receive salary adjustments (identified in the agreement as "Market Equity/Compression Adjustments") in recognition of the fact that their salaries had not kept pace with the market value of their services, as reflected in the salaries of more recently hired faculty members. JA 42. The Florida legislature made the funds for the 1991-92 adjustments available, but then withdrew the funding before the adjustments were to take effect. JA 42. The withdrawal of funding was found by the Florida Supreme Court to violate the Florida Constitution's Contracts Clause. *See Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 672-73 (Fla. 1993). The 1991-92 adjustments subsequently were distributed in a lump sum. JA 42. In 1992-93, however, salaries returned to the levels that had been in effect prior to the 1991-92 adjustments. JA 42-43. For 1993-94, the state legislature appropriated sufficient discretionary funds to cover permanent market equity/compression adjustments in the salaries of the senior employees of all the state universities. JA 43-44. The Regents, however, refused to require administrators at the universities to use the available funds in that manner. JA 43. Six of the nine universities nevertheless chose to allocate the funds to support permanent salary adjustments for senior employees, but FSU and FIU refused to allocate the funds for that purpose. JA 43-44. The Board of Regents sustained FSU's and FIU's action, and, notwithstanding the continued availability of funds, the Regents still refuse to include the market equity/compression adjustments in the *Kimel* plaintiffs' base salaries. JA 43-44.

[9] The *Kimel* plaintiffs also alleged violations of the Florida Human Rights Act, based on both "disparate treatment" and "disproportionate impact." JA 45. When the Court of Appeals ruled that the ADEA claims should be dismissed, it remanded the state-

In all three cases, the State defendants moved to dismiss the complaints on the ground that the Eleventh Amendment to the United States Constitution renders the States immune from suit in federal court under the ADEA.[10] The motions were denied in *Kimel* and *Dickson* and granted in *MacPherson*. *See* Pet. App. 51a-56a (*Kimel*); Pet. App. 57a-60a (*Dickson*); Pet. App. 61a-68a (*MacPherson*). Appeals were taken to the Eleventh Circuit in each case, and the appeals were consolidated for argument and decision.[11] The United States intervened in the Court of Appeals to defend the statute.

The Eleventh Circuit panel rendered three separate opinions, two of which concluded, on separate grounds,

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law claims with instructions that they likewise be dismissed. Pet. App. 13a, n.17. The disposition of the state-law claims is not at issue in this Court.

Subsequent to the district court's order denying the defendant's motion to dismiss the case on Eleventh Amendment grounds, the *Kimel* plaintiffs abandoned their disparate treatment claim. *See* Joint Pre-Trial Stipulation (Docket #114). Nevertheless, in their brief in the Court of Appeals, the Board of Regents characterized the case as presenting both a "conten[tion] that FSU and FIU have intentionally discriminated against [the *Kimel*] plaintiffs because of their age" and a "further conten[tion] that denial of the market adjustment has disparately impacted the salaries of workers over the age of forty relative to younger employees." Initial Brief of Appellant in *State of Florida Board of Regents v. J. Daniel Kimel, et al.*, 11th Cir. No. 96-2788, at 5. No party took the position in the Court of Appeals that the disparate treatment claim was not part of the case insofar as the Eleventh Amendment issue was concerned.

[10] In *Kimel*, before moving to dismiss the complaint on Eleventh Amendment grounds, the State defendant first moved to dismiss on other grounds. That motion was denied. JA 31-36. In *MacPherson*, the State defendant first moved for summary judgment on the merits, which was denied in part and granted in part. JA 110-126.

[11] The orders in *Kimel* and *Dickson*, although interlocutory, were appealable under *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

that the ADEA claims were barred by the Eleventh Amendment.

Judge Edmonson concluded that "the ADEA's language [does not] include[ ] an *unequivocal* declaration of abrogation of States' immunity." Pet. App. 11a, n.14 (emphasis in original). He reached that conclusion on the grounds that the ADEA does not conatin a "reference to the Eleventh Amendment or to States' sovereign immunity," or, "in one place, a plain, declaratory statement that States can be sued by individuals in federal court." Pet. App. 7a.

Judge Cox took the position that, "[w]hether or not Congress clearly expressed its intent, it lacks the power to abrogate the states' immunity . . . under the ADEA," Pet. App. 40a, because, in his opinion, the statute exceeds Congress' power to enforce the Fourteenth Amendment. Judge Cox declared that where age is involved, "the Supreme Court does not deem *all* arbitrary treatment offensive to the Fourteenth Amendment." Pet. App. 45a (emphasis in original). Rather, "[t]o violate the Equal Protection Clause . . ., the *arbitrary line itself* must have no rational basis." *Id.* (emphasis in original). According to Judge Cox, the ADEA is not permissible Fourteenth Amendment legislation because "the ADEA was enacted to combat *all* arbitrariness, unconstitutional or not." *Id.* (emphasis in original).

Chief Judge Hatchett dissented. He concluded that Congress' intent to abrogate the States' immunity from suits under the ADEA is stated with unmistakable clarity in the statute. Pet. App. 16a-18a. Chief Judge Hatchett also concluded

> that the ADEA falls squarely within the enforcement power that Section 5 of the Fourteenth Amendment confers on Congress. . . . Congress enacted

> the ADEA to remedy and prevent what it found to be a pervasive problem of arbitrary discrimination against older workers. Such protection is at the core of the Fourteenth Amendment's guarantee of equal protection under the law. Even though Congress arguably has gone further in proscribing government employment practices that discriminate on the basis of age than have the courts in adjudicating claims under the Fourteenth Amendment, this merely reflects the differing roles of Congress and the courts. [Pet. App. 21a-22a.] [12]

SUMMARY OF ARGUMENT

1. Congress made its intention to abrogate State immunity from private-party suits in federal court for violations of the ADEA "unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). In 1974, Congress (i) amended the ADEA to include the States among the "employers" to whom the Act applies, and who can be sued by employees for violations, and (ii) amended § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which is incorporated by reference in the ADEA, 29 U.S.C. § 626 (b), to provide that suits "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees." As this Court recognized in *Alden v. Maine*, —— U.S. ——, No. 98-436 (1999), slip op. at 2, that

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[12] The Eleventh Circuit further held in the *Dickson* appeal, over Judge Cox's dissent, that Congress permissibly abrogated the States' Eleventh Amendment immunity from suit in federal court under the Americans With Disabilities Act. *See* Pet. App. 12a-13a (opinion of Edmondson, J.); Pet. App. 29a-37a (opinion of Hatchett, J.); Pet. App. 48a-50a (opinion of Cox, J.). That ruling is not before the Court in this case. It is the subject of the petition for certiorari in *Florida Department of Corrections v. Dickson*, No. 98-829.

provision plainly "purport[s] to authorize private actions against States."

2. Congress had the authority to authorize such actions by virtue of its power under § 5 of the Fourteenth Amendment.

That Amendment "quite clearly contemplates limitations on [the States'] authority," placing on the States "duties with respect to their treatment of private individuals." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976). "Standing behind the imperatives is Congress' power to 'enforce' them 'by approriate legislation.'" *Id.* (quoting Fourteenth Amendment, § 5).

In exercising its § 5 powers, Congress may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick*, 427 U.S. at 456. And "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick*, 427 U.S. at 455). *See also Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, —— U.S. ——, No. 98-531, slip op. at 9-10 (1999).

The Fourteenth Amendment's Equal Protection Clause is directed first and foremost at arbitrary and invidious discrimination.

After an extensive process of factfinding and deliberation, through which Congress determined that older workers "were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), the

ADEA was enacted to combat such "invidious bias," *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995). And, upon finding that the same problems of arbitrary age discrimination that exist in the private sector are prevalent in government employment as well, Congress acted to apply the ADEA to the public sector.

Congress crafted in the Act a carefully measured set of prohibitions and exceptions to achieve the objective of preventing and remedying invidious age discrimination. Because such discrimination violates the Equal Protection Clause, there is every "reason to believe that many of the [employment actions] affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532. And, to the extent that the ADEA reaches some conduct that the courts would not find violative of the Equal Protection Clause, this largely reflects limitations on the nature and scope of *judicial* scrutiny rather than inherent substantive limitations on the Equal Protection Clause or on Congress' enforcement authority under § 5.

The ADEA statutory scheme thus is designed to "deter[] or remed[y] constitutional violations," *City of Boerne*, 521 U.S. at 518, and "[t]here [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *id.* at 520. Congress' decision to enact the ADEA and to apply it to the States is well within Congress' power under § 5 "to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (emphasis in original).

ARGUMENT

I. THE ADEA CONTAINS A CLEAR STATEMENT OF CONGRESS' INTENT TO SUBJECT STATES TO SUITS BY PRIVATE PARTIES IN FEDERAL COURT

This Age Discrimination in Employment Act lawsuit—like any private party federal statutory cause of action lawsuit against a State in federal court—raises two threshold Eleventh Amendment state sovereign immunity questions. First, did Congress, in enacting the ADEA, have the constitutional authority to subject the States to such suits in federal court and in that respect to abrogate the States' Eleventh Amendment immunity? And, second, if so, did Congress in the ADEA make its intention to abrogate State immunity unmistakably clear? As to both questions the answer here is an unequivocal "yes." [13]

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[13] In *EEOC v. Wyoming*, 460 U.S. 226 (1983), this Court noted, but did not decide, the question "whether [the ADEA] could . . . be upheld as an exercise of Congress' powers under § 5 of the Fourteenth Amendment." 460 U.S. at 243. *See also id.* at 251, 259-263 (Burger, C.J., dissenting); *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991). In the ensuing years eight circuits have answered that question in the affirmative and have held that the ADEA clearly and permissibly abrogates State immunity from suit in federal court. *Wichmann v. Board of Trustees of Southern Ill. Univ.*, —— F.3d ——, No. 97-2902, 1999 WL 366742 (7th Cir. June 7, 1999); *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761 (7th Cir. 1998); *Davidson v. Board of Governors of State Colleges & Univ.*, 920 F.2d 441 (7th Cir. 1990); *Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir. 1998); *Migncault v. Peck*, 158 F.3d 1131 (10th Cir. 1998); *Hurd v. Pittsburgh State University*, 109 F.3d 1540 (10th Cir. 1997); *Coger v. Board of Regents of State of Tenn.*, 154 F.3d 296 (6th Cir. 1998); *Keeton v. University of Nev. Sys.*, 150 F.3d 1055 (9th Cir. 1998); *Scott v. University of Miss.*, 148 F.3d 493 (5th Cir. 1998); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977). *See also Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1996) (stating the same view in dictum). The Eleventh Circuit's

In the first regard, this case is governed by *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In stating the *Fitzpatrick* Court's holding, Justice Rehnquist (as he then was) put the salient point there and here simply and succinctly:

> [W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . ., are necessarily limited by the enforcement provsions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. [427 U.S. at 456 (footnote omitted).]

All of the Court's recent Eleventh Amendment/state sovereign immunity cases reaffirm *Fitzpatrick's* holding on Congress' Fourteenth Amendment § 5 authority to subject the States to private party federal statutory causes of action in federal court. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996) ("§ 5 of the Fourteenth Amendment allow[s] Congress to abrogate the immunity from suit guaranteed by [the Eleventh] Amendment");

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contrary position also has been adopted by the Eighth Circuit. *See* ***Humenansky v. Regents of Univ. of Minn.***, 152 F.3d 822 (8th Cir. 1998).

Alden v. Maine, —— U.S. ——, No. 98-436, slip. op. at 47 (1999) ("in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power"); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank,* —— U.S ——, No. 98-531, slip op. at 8 (1999) ("*Florida Prepaid*") ("this Court in *Seminole Tribe* . . . reaffirmed its holding in *Fitzpatrick* . . . that Congress retains the authority to abrogate state sovereign immunity pursuant to the Fourteenth Amendment"); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* —— U.S. ——, No. 98-149, slip op. at 2 (1999) ("Congress may authorize . . . a suit [by an individual against a State] in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance").

In the second regard, as we now show, the ADEA's statutory language meets the requirement of *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985) that "Congress may abrogate the States' constitutionally secure immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."

"[T]here is no doubt [that] the intent of [the 93d] Congress was . . . to extend the aplication of the ADEA to the States." *EEOC v. Wyoming,* 460 U.S. at 244 n.18. *See supra* at 4-6. And, the enforcement provisions incorporated into the ADEA state in terms that Congress is authorizing employees aggrieved by a State's violation of the Act to bring suit for redress against the State in federal court.

"[The] remedial provisions [of the ADEA] incorporate by reference the provisions of the Fair Labor Standards Act [FLSA]." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995). *See generally Lorillard v. Pons*, 434 U.S. 575, 578-79 (1978). "[B]ut for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Id.* at 582.[14] The vehicle for that incorporation is § 7(b) of the ADEA, 29 U.S.C. § 626(b), which provides that "[t]he provisions of [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in [specified sections of the FLSA]."

Section 16(b) of the FLSA, 29 U.S.C. § 216(b)—which is "one of the provisions the ADEA incorporates," *Hoffmann-LaRoche Inc. v. Sperling*, 493 U.S. 165, 167 (1989)—in its turn provides that suits for violations "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees." And, "public agency" as used therein is defined to include "a State, or a political subdivision of a State." 29 U.S.C. § 203(x). As the Court recognized in *Alden v. Maine*, the point of this statutory language is to "purport to authorize private actions against States . . . without regard for consent." Slip op. at 2.

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[14] Thus, many essential components of the ADEA enforcement scheme are found only in the language incorporated by reference from the FLSA. This is true, for example, of the procedures applicable to class actions, *see Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165 (1989), the authorization of attorneys' fees (not mentioned in the text of the ADEA but incorporated by reference into 29 U.S.C. § 216(b)), and the calculation of liquidated damages (the availability of which is limited by ADEA § 7(b) to cases of willful violations, but the amount of which is determined by reference to 29 U.S.C. § 216(b)).

Indeed, the evolution of § 16(b) demonstrates that its precise office is to authorize private party suits against the States and to do so in a manner that unmistakably abrogates State immunity from suit. Prior to 1974, § 16(b) did not contain specific references to "public agenc[ies]" and to "Federal or State" courts. *See Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 283 (1973) ("*Missouri Employees*") (quoting the original language). In 1973, this Court held in *Missouri Employees* that the original language of § 16(b) did not clearly abrogate the States' Eleventh Amendment immunity. In amending the provision the next year to refer specifically to "public agenc[ies]" and to "Federal or State" courts, *see* Pub. L. 93-259, § 6(d)(1), 88 Stat. 62, Congress also enacted 29 U.S.C. § 255(d), which retroactively suspended the running of the statute of limitations "with respect to any cause of action brought under section 16(b) . . . against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973"—the date *Missouri Employees* was decided. *See* Pub. L. 93-259, § 6(d)(2)(A), 88 Stat. 62. That statutory language leaves no doubt that the 1974 amendment to § 16(b) was intended to supply the clear statement of Congress' intention to abrogate State immunity that the *Missouri Employees* Court had found to be lacking in the pre-1974 provision. And, the Committee Reports accompanying the 1974 amendment make that point in terms:

> This amendment is necessitated by the decision of the U.S. Supreme Court in *Missouri, et al.* (April, 1973) which held that Congress in extending coverage under the 1966 amendments to school and hospital employees in state and local governments did not explicitly provide the individual a right of action in the Federal courts although the Secretary of Labor

> was authorized to bring such suits. In addition the committee included an amendment to the Portal-to-Portal Act of 1947 [29 U.S.C. § 255(d), *supra*] which would preserve existing actions brought by private indivduals which would otherwise be barred by the statute of limitations as a result of the April decision. [H. Rep. No. 93-913, 93d Cong., 2d Sess., 41 (1974).]

See also id. at 45 S. Rep. No. 93-690, 93d Cong., 2d Sess., 56 (1974).

By incorporating § 16(b) in the ADEA, then, Congress unmistakably subjected the States to private party suits in federal court for violations of the Act. To be sure, Judge Edmondson took a contrary position in the court below, considering it decisive that "[n]o reference to the Eleventh Amendment or to States' sovereign immunity is included [in the ADEA]. Nor is there, in one place, a plain, declaratory statement that States can be sued by individuals in federal court." Pet. App. 7a. That is to misunderstand the *Atascadero* clear statement rule. As Justice Scalia indicated in his separate opinion in *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989), an "explicit reference to state sovereign immunity or the Eleventh Amendment" is *not* required. And, this Court in *Seminole Tribe* found an unmistakably clear statement of Congress' intent to abrogate State immunity in a statute that had no express reference to sovereign immunity or the Eleventh Amendment—a statute, moveover, so constituted that it was necessary to read its "various provisions" together, and to consider their "context," 517 U.S. at 56-57, in order to discern Congress' clear intent to make the States subject to suit and to abrogate their Eleventh Amendment immunity.

We recognize too that in *Humenansky v. Regents of University of Minnesota, supra* note 13, the Eighth Cir-

cuit held that Congress' incorporation into the ADEA of § 16(b) is not a sufficient indication of its intent to abrogate the States' immunity from ADEA suits because that action was not accompanied by an amendment to § 7(c) of the ADEA, 29 U.S.C. § 626(c), which states, among other things, that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." *See Humenansky*, 152 F.3d at 824-25.

But the amendment that Congress *did* make to FLSA § 16(b) was sufficient to accomplish its ends, and Congress had no need to amend ADEA § 7(c) as well. It cannot be gainsaid, *first*, that § 16(b) is in its own terms an unmistakably clear statement of Congress' intent to subject the States to private party suits and to abrogate their immunity, *see supra* at 17; *second*, that § 16(b) is, through its incorporation by § 7(b), part of the ADEA, *see supra* at 17; and *third*, that § 7(c) of the ADEA—which simply is less *specific* than § 16(b)—in no way *conflicts* with the latter provision. The ADEA thus contains (through the § 7(b) incorporation by reference) a provision that expressly authorizes private party suits against the States without their consent, see *Alden*, *supra*, and neither § 7(c) nor any other provision of that ADEA countermands that authorization. By incorporating § 16(b) into the ADEA, Congress clearly and unmistakably abrogated the States' Eleventh Amendment immunity from suits by employees to redress violations of the Act.

All this being true, the sole remaining question to be decided here is whether § 5 of the Fourteenth Amendment grants Congress the authority to enact age discrimination legislation such as the ADEA. We turn to that question now and show that again the answer is "yes."

II. THE APPLICATION OF THE ADEA TO THE STATES IS WITHIN CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

A. Congress Has Broad Authority to Enact Legislation Enforcing the Equal Protection Guaranty of the Fourteenth Amendment

In holding that Congress has the power under § 5 of the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity from suit, *see supra* at 15, the *Fitzpatrick* Court began by observing that the Fourteenth Amendment "quite clearly contemplates limitations on [the States'] authority . . . The substantive provisions are by express terms directed at the States. Impressed upon them by those provisions are duties with respect to their treatment of private individuals." 427 U.S. 453. And, after so recognizing the Amendment's role as a limit on state authority, the *Fitzpatrick* Court went on immediately to recognize Congress' paramount role in translating the Amendment's commands into positive statutory law: "Standing behind the imperatives is Congress' power to 'enforce' them 'by appropriate legislation.'" *Id.*

Citing *Ex parte Virginia*, 100 U.S. 339 (1880), and subsequent decisions, as having explicated "the reach of congressional power under § 5," 427 U.S. at 453, the *Fitzpatrick* Court added:

> There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the

> States' ratification of those Amendments. [*Id.* at 455-56.]

In each of the foregoing regards, *Fitzpatrick* has the firmest grounding in the constitutional text. The substantive provisions of the Fourteenth Amendment, set out in § 1 thereof, are self-executing. *See City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). If the Framers of the Amendment had intended that the Amendment would be effectuated solely through judicial determinations as to whether this, or that, particular state government action violated the Amendment's commands, the Framers could have rested with § 1. But the Framers went on to establish Congress' enforcement power in § 5. "By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1." *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966). *See also Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966) (the Fourteenth Amendment was designed to "augment[ ] the power of Congress, rather than the judiciary"); *City of Boerne*, 421 U.S. at 536 ("[i]t is for Congress in the first instance to 'determine[ ] whether and what legislation is needed to secure the guarantees for the Fourteenth Amendment,' and its conclusions are entitled to much deference") (quoting *Katzenbach v. Morgan*, 384 U.S. at 651); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (§ 5 grants Congress "a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment").

The Court's understanding of the place of the Fourteenth Amendment in the federal-state balance and of the central role of Congress in enforcing the Amendment's guarantees has been uniform from *Ex parte Virginia* to *Fitzpatrick* and beyond. Thus, two Terms ago the Court described Congress' § 5 power as follows:

All must acknowledge that § 5 is "a positive grant of legislative power" to Congress, *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). In *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880), we explained the scope of Congress' § 5 power in the following broad terms:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." [*City of Boerne*, 521 U.S. at 517-18.] [15]

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[15] Elaborating on the analysis in *Ex parte Virginia*, numerous decisions of this Court have described Congress' power under § 5 as having the same breadth as its power to legislate under the Necessary and Proper Clause:

> The basic test to be applied in a case involving [the enforcement clauses of the Civil War Amendments] is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the [Amendments were] ratified:
>
> > "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316, 421 [17 U.S. 316 (1819)]. [*South Carolina v. Katzenbach*, 383 U.S. at 326.]

Accord, Fullilove v. Klutznick, 448 U.S. 448, 476 (1980) (opinion of Burger, C.J.); *City of Rome v. United States*, 446 U.S. 156, 176-77 (1980); *Katzenbach v. Morgan*, 384 U.S. at 650-51.

Thus, in authorizing Congress to enact "appropriate" legislation to enforce the provisions of the Fourteenth Amendment, *see Florida*

And, the Court went on to say:

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." [*Id.* at 518 (quoting *Fitzpatrick*, 427 U.S. at 455).]

As the foregoing makes evident, "[i]t has never been seriously maintained that Congress can do no more than the judiciary to enforce the [Fourteenth] Amendment's commands." *City of Rome v. United States*, 446 U.S. 156, 210 (1980) (Rehnquist, J., dissenting). To the contrary, "[t]he power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *J.A. Croson*, 488 U.S. at 490 (opinion of O'Connor, J.) (emphasis in original).

Not surprisingly then, both *City of Boerne* and *Florida Prepaid* expressly reaffirm Congress' authority under § 5 to enact legislation that "prohibits conduct which is not itself unconstitutional," *City of Boerne*, 521 U.S. at 518; *Florida Prepaid*, slip op. at 9-10, as long as the legislation is not so far removed from enforcing rights created by the Fourteenth Amendment that the enactment can only be seen as an attempt "to decree the *substance* of the Fourteenth Amendment's restrictions on the States." *City of Boerne*, 521 U.S. at 545 (O'Connor, J., dissenting)

Prepaid, slip op. at 9, the Framers of the Amendment did not leave the courts free to second-guess Congress' judgment as to what legislation is "appropriate," any more than the Necessary and Proper Clause leaves the courts free to second-guess the "necess[ity]" or "prop[riety]" of legislation.

(emphasis in original), quoting *id.* at 519 (opinion of the Court).

At the same time, both *City of Boerne* and *Florida Prepaid* remind us that, " '[a]s broad as the congressional enforcement power is, it is not unlimited,' . . . and . . . 'Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.' " *Florida Prepaid*, slip op. at 10, quoting *City of Boerne*, 521 U.S. at 518-19. In considering whether legislation crosses "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law," *City of Boerne*, 521 U.S. at 519, the Court has looked to whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *id.* at 520. Such "congruence and proportionality" are demanded not for their own sake, but as a gauge in determining whether the legislation in question operates to protect rights recognized under the Fourteenth Amendment, or to create rights apart from those established by the Amendment. *Id.* at 519-20.

City of Boerne and *Florida Prepaid* begin—and only begin—the process of giving content to this distinction and to the "congruence and proportionality" test. We characterize the two decisions in those terms because the statutes in question in those cases were on their face designed to work a qualitative substantive *change* in Fourteenth Amendment rights, not to *enforce* any such right.

In *City of Boerne*, Congress had announced that it was enacting the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, because Congress was of the view that "governments should not substantially burden

religious exercise without compelling justification." 521 U.S. at 515, quoting 42 U.S.C. § 2000bb(a)(3). The substantive provisions of the statute were designed to enforce that congressional-created norm, rather than to prevent any unconstitutional action. *See* 521 U.S. at 515-16, 532-35. RFRA, in other words, was an attempt by Congress to overrule this Court's decision in *Employment Div., Dep't. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), which had held that the Constitution does not give religious practitioners a right to be free of burdens resulting from laws of general application.

In *Florida Prepaid*, the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), 35 U.S.C. § 271(h), 296(a), in the guise of legislation to enforce the Due Process Clause sought to authorize suits against States in federal court for patent infringement. Despite settled law that a due process violation exists only where a State has committed an intentional deprivation of property *and* has failed to provide adequate remedies. the Patent Remedy Act was not focused on intentional infringement, and the adequacy or inadequacy of state remedies played no role whatsoever in the operation of the Act. *See Florida Prepaid*, slip op. at 16-17.[16]

"Simply put, RFRA [and the Patent Remedy Act were] not designed to identify and counteract state laws likely to be unconstitutional." *City of Boerne*, 521 U.S. at 534-35. As we now proceed to demonstrate, the ADEA is at the opposite end of the Fourteenth Amendment spectrum. As legislation adopted to prevent and remedy arbitrary and

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[16] In both *City of Boerne* and *Florida Prepaid*, the Court found as well that the legislative histories of the statutes at issue there confirmed that they had been designed to accomplish ends having nothing to do with the enforcement of rights created by the Fourteenth Amendment. *See City of Boerne*, 521 U.S. at 529-32; *Florida Prepaid*, slip op. at 11-20.

invidious discrimination, the ADEA "can[] be understood as responsive to, or designed to prevent, unconstitutional behavior," *id* at 532, and as such the Act is within Congress' § 5 authority.

B. The ADEA Is Within Congress' § 5 Enforcement Authority

1. Antidiscrimination legislation such as the ADEA is squarely within Congress' authority under Fourteenth Amendment § 5 to enforce the Equal Protection Clause.

That Clause is "essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 439 (1985). Accordingly, a State violates the Clause if it "rel[ies] on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446. *See also Romer v. Evans*, 517 U.S. 620, 635 (1996) (characterizing this as the "conventional and venerable" principle of the Equal Protection Clause); *Lindsey v. Normet*, 405 U.S. 56, 79 (1972) ("discrimination against [the poor that is] arbitrary and irrational . . . violates the Equal Protection Clause"); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988) ("As *Lindsey* demonstrates, arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review."); *Williams v. Vermont*, 472 U.S. 14, 22 (1985) ("to provide a [tax] credit only to those who were residents . . .. is an arbitrary distinction that violates the Equal Protection Clause").

A State's ordering of its relations with those who are or would be in its service is subject to this basic command of the Equal Protection Clause: the Clause gives individuals "a federal constitutional right to be considered for public service without the burden of invidiously discriminatory

disqualifications." *Turner v. Fouche*, 396 U.S. 346, 362 (1970). *Accord, Quinn v. Millsap*, 491 U.S. 95 (1989). An emploment qualification need not be based on race or some other inherently suspect criterion to be considered "invidiously discriminatory" in this sense. This Court has characterized the ADEA itself as directed at "invidious bias." *McKennon*, 513 U.S. at 357. And, in *Quinn*, this Court unanimously held that "it is a form of invidious discrimination to require land ownership of all appointees to a body authorized to propose reorganization of local government." *Id.* at 107. The Court reached that result by "apply[ing] no more than . . . rationality review," *id.*, and despite the local government's contention that the land ownership qualification was rational because it tended to ensure that appointees would have "first-hand knowledge of," and a "tangible stake" in, the governmental activities with which the body would deal. *Id.*[17]

2. After a "process of factfinding and deliberation formally begun in 1964," *EEOC v. Wyoming*, 460 U.S. at 231, Congress enacted the ADEA "to prohibit arbitrary age discrimination," *id.* at 229. The ADEA, aimed as it is at eliminating "invidious bias in employment decisions," *McKennon*, 513 U.S. at 357, thus serves—in common with the other federal employment discrimination statutes—to enforce the core command of the Equal Protection Clause. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and

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[17] *See also Turner*, 396 U.S. at 364 (although it may be "reasonable [to] assum[e]" that ownership of property contributes to an individual's "attachment to the community and its educational values," the State "may not rationally presume that that quality is necessarily wanting in all citizens of the county [who do not possess such property]").

stigmatizing stereotypes.") *Cf. Commissioner v. Schleier*, 515 U.S. 323, 339 (1995) (O'Connor, J., dissenting) (observing that discrimination based on age works the same "offense to the rights and dignity of the individual . . . [as] discrimination that is based on race [or] sex").[18]

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[18] Congress did not make any explicit reference to the Fourteenth Amendment when it extended the ADEA to the States. But "the . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Wyoming*, 460 U.S. at 243-44 n.18, quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

It is true that, where a party urges an application of a statute that would be permissible only if Congress had exercised its § 5 authority, *and the statute is ambiguous as to whether it was intended to be applied as the party is urging*, the Court does require a clear indication that Congress was invoking its § 5 power. *See Gregory*, 501 U.S. at 470-73; *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 15-17 (1981). Such "a rule of statutory construction to be applied where statutory intent is ambiguous," *Gregory*, 501 U.S. at 470, has nothing to do with a rule that would require Congress to specify the constitutional provision under which it was legislating *when there is no ambiguity as to how the substantive terms of the legislation are to be applied. See Wyoming*, 460 U.S. at 244 n.18 (distinguishing *Pennhurst*); *Hilton v. South Carolina Pub. Railways Comm'n*, 502 U.S. 197, 206 (1991) ("the plain statement rule [i]s 'a rule of statutory construction to be applied where statutory intent is ambiguous' . . ., rather than . . . a rule of constitutional law").

Very simply stated, Congress is not required to make a recital of the source of its power in the text of the statute, whose office is to state what Congress is commanding, not to justify Congress' action by identifying the source(s) of constitutional power. And, it would be unprecedented even to suggest that Congress must set out in *legislative history* the powers under which it has acted. "It is in the nature of [this Court's] review of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" *Wyoming*, 460 U.S. at 243 n.18. *See Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (opinion of Burger, C.J.);

As the Court noted in *EEOC v. Wyoming*, the enactment of the ADEA was prompted by a report of the Secretary of Labor, "whose findings were confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress," which "came to the . . . basic conclusions . . . [that] age discrimination . . . was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes . . .[; that] the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers . . . [; and that] arbitrary age discrimination was profoundly harmful . . . [to] the national economy . . . [and to] individual workers." 460 U.S. at 230-31. *See also* 113 Cong. Rec. 34746 (1967) (Rep. Daniels) (the ADEA's "legal prohibition against age discrimination in employment" is necessary "to overcome prejudice"); *Age Discrimination in Employment: Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate*, 90th Cong., 1st Sess., 28 (1967) (Sen. Javits) (the ADEA was designed to "break down . . . wholly irrational barriers to employment based on age alone").

Not only the legislative history, but the statement of purpose codified in the Act, emphasizes that Congress' aim was to prevent and to remedy *arbitrary discrimination* based on age. *See* ADEA § 2(a)(2), 29 U.S.C § 621(a)(2) ("the setting of arbitrary age limits regardless of potential for job performance has become a common practice"); § 2(a)(4), 29 U.S.C. § 621(a)(4) (referring to "arbitrary discrimination in employment because of

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Griffin v. Breckenridge, 403 U.S. 88, 107 (1971); *United States v. Butler*, 297 U.S. 1, 61 (1936); *Woods v. Cloyd W. Miller Co.*

age"); § 2(b), 29 U.S.C. § 621(b) ("It is therefore the purpose of this chapter . . . to prohibit arbitrary age discrimination in employment").[19]

Although the ADEA as enacted in 1967 was confined to private employment, Congress soon came to understand that the same problems of arbitrary discriminaton were prevalent in government employment as well. "In a Report issued in 1973, a Senate Committee found [the Act's] gap in coverage to be serious, and commented that '[t]here is . . . evidence that, like the corporate world, government managers also create an environment where young is somehow better than old.'" *Wyoming*, 460 U.S. at 233, quoting Senate Special Committee on Aging, *Improving the Age Discrimination Law*, 93d Cong., 1st Sess., 14 (Comm. Print 1973).

A year before that report was issued, Senator Bentsen had introduced a bill to extend the ADEA to public em-

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[19] The Secretary of Labor's report distinguished between "action to eliminate arbitrary age discrimination in employment," on the one hand, and other kinds of action "to adjust institutional arrangements which work to the disadvantage of older workers," "to increase the availability of work for older workers," and "to enlarge educational concepts and institutions to meet the needs and opportunities of older age." Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965) at 21-25, reproduced in EEOC, Legislative History of the Age Discrimination in Employment Act (1981) at 16 *et seq.* It was under the first of those categories—"action to eliminate arbitrary age discrimination"—that the Secretary proposed the adoption of enforcement legislation. Report of the Secretary of Labor at 21-22. Consistent with the Secretary's recommendations, the preamble to the ADEA mentions other purposes besides the elimination of discrimination. *See* ADEA § 2(a)(1), (3), (b), 29 U.S.C. § 621(a)(1), (3), (b). Those additional purposes gave rise to the provisions of the Act establishing education and research programs, *see* ADEA § 3, 29 U.S.C. § 622, not to the enforcement provisions of the statute that are the subject of this case. *See* Report of the Secretary of Labor at 22-25 (recommending actions along the lines ultimately embodied in § 3).

ployment, declaring that "there are strong indications that the hiring and firing practices of governmental units discriminate against the elderly," often in "flagrant" fashion. 118 Cong. Rec. 7745 (1972) (citing newspaper reports, case studies, letters and other sources of information). In extending the ADEA to public employment in 1974, Congress made clear that it was doing so in order to prevent and remedy the same kinds of arbitrary and irrational discriminaton as had been the focus of the 1967 legislation. Senator Bentsen stated that "[t]he passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector." 120 Cong. Rec. 8768 (1974). The House Committe Report similarly explained:

> As the President said in his message of March 23, 1972, suporting such an extension of coverage under the ADEA, "Discriminaton based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. . . ." [H. Rep. No. 93-913, *supra*, at 40; S. Rep. No. 93-690, *supra*, at 55.]

The Report went on to discuss the need to "dispel[] 'preconceived notions or myths' about the older worker," and concluded:

> The committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment. [H. Rep. No. 93-913, at 40-41; S. Rep. No. 93-690, at 55-56.]

Accordingly, the substantive provisions of the ADEA are designed to "prohibit[] arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. at 577. Under the ADEA, a showing that an employer took an action that harmed an older worker "because of [his] age" is necessary to establish a case.[20] But such a show-

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[20] Section 4(a)(1) of the Act, 29 U.S.C. § 623(a)(1), makes it unlawful for an employer "to . . . discriminate . . . because of [an] individual's age." Section 4(a)(2), 29 U.S.C. § 623(a)(2), makes it unlawful as well for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." Those provisions "were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. at 584. *See* 42 U.S.C. § 2000e-2(a). Under Title VII, the language has been interpreted by this Court to allow claims based on disparate impact as well as claims based on disparate treatment. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Congress subsequently amended Title VII to provide more explicitly for causes of action based on disparate impact, and to clarify the proof requirements for such claims. *See* Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991). The ADEA, however, was not amended in this respect.

Because the ADEA contains the language that, in *Griggs*, was held to contemplate disparate impact claims, we submit that such claims are cognizable under the ADEA. However, this Court "ha[s] never decided whether a disparate impact theory of liability is available under the ADEA." *Hazen Paper Co.*, 507 U.S. at 610. *See also id.* at 618 (Kennedy, J., concurring); *Markham v. Geller*, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from denial of certiorari). Subsequent to *Hazen Paper Co.*, three circuits have held that disparate impact claims are cognizable under the ADEA. *See Arnett v. California Public Employees Retirement Sys.*, —— F.3d ——, No. 98-15574, 1999 WL 346629 (9th Cir. June 2, 1999); *District Council 37 v. New York City Dept. of Parks & Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *Houghton v. SIPCO*, 38 F.3d 953, 958-59 (8th Cir. 1994). Four circuits have held or suggested the contrary. *See Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996); *Lyon v. Ohio Educ. Ass'n*, 53 F.3d 135, 138-39 (6th Cir. 1995); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir. 1994), *cert. denied*, 515

ing is not *sufficient* to establish that the employer has violated the Act: the employer's action still may be found to be permissible under the Act by reason of any of several exceptions fashioned by Congress to protect practices that can be shown to be based on reasonable distinctions rather than on irrational stereotypes.

First, and perhaps foremost, "in order to insure that employers [a]re permitted to use neutral criteria not directly dependent on age, and in recognition of the fact that even criteria that are based on age are occasionally justified, the Act provide[s] that certain otherwise prohibited employment practices [are] not . . . unlawful 'where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.'" *Wyoming*, 460 U.S. at 232-33, quoting § 4(f)(1), 29 U.S.C. § 623(f)(1). Among other things, that provision leaves an employer, including a State, free to "assess the fitness of its [employees] and dismiss those . . . whom it reasonably finds

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U.S. 1142 (1995). The Eleventh Circuit has described the issue as an open one. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1437 n.17 (11th Cir.), *cert. denied*, 119 S. Ct. 405 (1998).

Whether the ADEA allows claims based on disparate impact—and if so, in what circumstances and subject to what standards of proof—is not presented for decision in this case. The Eleventh Circuit dismissed all of the claims in the three consolidated actions, including claims of disparate treatment. To decide this case, it is sufficient to determine whether ADEA disparate *treatment* claims may be pursued against a State in federal court. If the answer is yes, the decision below must be reversed; the question whether disparate *impact* claims may be asserted against a State defendant then could be considered by the Court of Appeals on remand. However, if this Court finds it appropriate to address that question, our submission will establish that Congress has the power under § 5 to authorize disparate impact claims on the terms contained in the ADEA. *See infra* at 43-44 and note 26.

to be unfit." *Wyoming*, 460 U.S. at 239. The State's "goals" as an employer, and "the public policy decisions underlying them," *id.*, thus are preserved; the Act simply "requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case." *Id. See also Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 361, 360-61 (1985).

Congress also recognized that the costs of many benefit plans would increase significantly if such plans had to be provided to older workers on the same terms as to younger workers. To ensure that the Act would not operate to prohibit reasonable age distinctions in such plans, "Congress, in passing the ADEA, included a provision specifically disclaiming a construction of the Act which would require that the health and similar benefits received by older workers be in all respects identical to those received by younger workers." *Wyoming*, 460 U.S. at 241-42, citing § 4(f)(2), 29 U.S.C. § 623(f)(2). The Act addresses the subjects of pension benefits, retiree health benefits, and severance pay in great detail, in an effort to define the circumstances in which age-based distinctions regarding such benefits reflect legitimate cost concerns rather than arbitrary discrimination. *See* §§ 4(f)(2)(B), (i), (1), 29 U.S.C. §§ 623(f)(2)(B), (i), (1).

Congress displayed in addition a particular concern for legitimate interests of state and local governments, by *inter alia*, limiting the Act's application to public safety positions, and excluding altogether elected officials, their non-civil-service personal staffs and advisers and policy-making appointees. *See supra* at 5.[21]

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[21] In addition, in amending the ADEA in 1990 to make clear that discriminatory benefit plans need not affect non-fringe-benefit aspects of the employment relationship in order to be actionable, Congress delayed the application of the amendments to any state or local government that would need to change an existing law in

In sum, the Act was adopted to prevent and remedy *arbitrary discrimination*, and Congress crafted a carefully measured set of prohibitions and exceptions to achieve that end. The Act thus operates to enforce the commands of the Equal Protection Clause.

3. Throughout the ADEA/Eleventh Amendment litigation there has been much discussion of the significance to be assigned to the trio of cases in this Court upholding against Equal Protection Clause attacks, state and federal laws requiring mandatory retirement of certain classes of employees or officials at specified ages: *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (*per curiam*); *Vance v. Bradley*, 440 U.S. 93 (1979); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991). That discussion has been generated by the suggestion that those cases establish that age discrimination in employment is, as a general matter, countenanced by the Equal Protection Clause, and that the ADEA thus has no Equal Protection Clause predicate. That suggestion is untenable.

a. In the first place, *Murgia*, *Vance*, and *Gregory* do *not* hold that government is free to impose on public employees as a class any and all age-based employment restrictions. To the contrary, *Murgia* and its progeny upheld a specific restriction (mandatory retirement) on unique occupations—police officers in *Murgia*, foreign service officers in *Vance*, and judges in *Gregory*—and no

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order to comply, *see* Pub. L. 101-433, § 105(c)(1), 104 Stat. 981 (1990), and allowed state and local governments to continue to apply non-complying disability benefit programs to any employees who did not elect to be covered by new programs that conformed with the statute. *Id.* § 105(c)(2), 104 Stat. 981-82. Congress also directed the Equal Employment Opportunity Commission, the Secretary of Labor, and the Secretary of Treasury to provide assistance and technical advice to assist States in complying with the provisions of the Act applicable to benefit programs. *Id.*, § 105 (c)(3), 104 Stat. 982.

more. *See Murgia*, 472 U.S. at 314-15, nn. 7, 8 (emphasizing physical demands of police work); *Vance*, 440 U.S. at 98-102 (emphasizing features of the foreign service that make it desirable to ensure a steady stream of retirements in order to create promotional opportunities); *id.* at 103-06 (emphasizing unique demands placed on foreign service officers posted abroad); *Gregory*, 501 U.S. at 471-73 (explaining that individual judges whose performance may be deteriorating due to age cannot readily be identified or removed, thus making a categorical mandatory retirement provision a reasonable solution to the perceived problem).

b. In the second place, as the *Vance* Court emphasized, in an equal protection case that "involves a legislative classification contained in a statute," the reasonableness of the legislature's action cannot be assessed as in "ordinary civil litigation." 440 U.S. at 110. *Murgia* and its progeny involved statutes or cognate state constitutional provisions. *Murgia* recognizes and draws on the commonplace that "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." 427 U.S. at 314. "[S]uch imperfection [is accepted] because it is in turn rationally related to the secondary objective of legislative convenience." *Vance*, 440 U.S. at 109.

As this Court put it in *Romer v. Evans*, 517 U.S. at 631, "[t]he Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another," and the deferential mode of judicial review that applies where legislation is challenged under the Equal Protection Clause reflects an "attempt[] to reconcile the principle with the

reality." It is for these reasons that "[a person challenging a] legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance*, 440 U.S. at 111.[22]

Gregory, which involved a challenge to a provision in a state constitution, likewise presented a situation where the challenged provision of law necessarily was based on generalities, and where the lawmaking body—the people of Missouri—could not be called upon to produce a factual record supporting the law. As the *Gregory* Court explained, the voters, who alone are responsible for electing and reelecting judges, have little direct contact with the judges, and are not in a position to assess whether a particular judge's performance has deteriorated due to age. 501 U.S. at 472. Nor is the impeachment process—the only procedure for removing a judge—well designed to serve such a purpose. *Id.* Consequently, if the people of Missouri were to have any means of addressing the possible impact of age on judicial performance, they had no feasible way to deal with the matter on an individualized basis, but could only adopt a law "founded on a generalization." *Id.* at 473.

Whatever *Murgia*, *Vance* and *Gregory* may suggest about the validity under the Equal Protection Clause of statutory or constitutional provisions that adopt age distinctions—and, as we have explained, those cases do *not*

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22 *See also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (a "[l]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) (a court reviewing a statutory classification must bear in mind that it "can be only dimly aware" of the facts on which the "legislative judgment" might be based); *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

suggest that all such provisions satisfy the Equal Protection Clause—the cases in no way suggest that the Equal Protection Clause allows a government employer to resort to stereotypical generalizations about older workers whenever and however the employer makes a decision that affects such a worker. Although the ADEA can, of course, be applied to challenge state and local laws (and properly so, *see infra* note 24), most cases under the statute do not involve a challenge to legislative action, but to discretionary employment decisions such as are made every day by supervisors and managers who have at their disposal specific facts that can inform their action and against which their action can be assessed.[23] *Murgia, Vance* and *Gregory* do not address such decision-making, and do not so much as intimate that, under the Equal Protection Clause, public personnel authorities are free to make employment decisions on the basis of stereotypes, ignoring facts readily at hand regarding the merits and capabilities of the individuals involved.

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[23] In this respect, many of the government actions that can be challenged under the ADEA are like the action challenged in *Cleburne*—a city's decision to require a special use permit for a particular home for retarded persons—in that they do not involve the enactment of laws of general applicability, but rather the making of a more narrowly focused decision based on specific facts. Unlike review of legislation, in which the courts do not require the legislature to point to any factual record supporting its judgments, *see supra* at 37-38 and n.22, in *Cleburne* this Court found a violation of the Equal Protection Clause "[b]ecause . . . *the record d[id] not reveal* any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests." 473 U.S. at 448 (emphasis added). The Court rested its decision squarely on the city's failure to establish on the record a sufficient justification for the specific action it had taken: the city's action was held unconstitutional because "this record does not clarify how . . . the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes." *Id.* at 450.

c. The results in *Murgia*, *Vance* and *Gregory*, and this Court's reasoning in those cases, also are crucially dependent on the fact that what was involved was the direct judicial authority to review state action under § 1 of the Fourteenth Amendment, and not the authority of Congress to legislate under § 5. "Section 5 of the [Fourteenth] Amendment empowers Congress to enforce [the equal protection] mandate, but *absent controlling congressional direction*, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection." *Cleburne*, 473 U.S. at 439-40 (emphasis added). And, the resulting rational basis standard that this Court applied to the mandatory retirement provisions in *Murgia*, *Vance* and *Gregory* is "a paradigm of *judicial* restraint," *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993) (emphasis added), which reflects the "different institutional competences" of courts and legislatures, *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). *See also Harris v. McRae*, 448 U.S. 297, 326 (1980) (in equal protection cases, making an independent appraisal of competing interests goes "beyond the judicial function"); *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) ("The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility"), *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (that a statutory line "might have been drawn differently . . . is a matter for legislative, rather than judicial, consideration").

Precisely because age requirements are "a matter for legislative, rather than judicial consideration," the deferential standard of judicial review that governed the Court's decisions in *Murgia*, *Vance* and *Gregory*—however those decisions may be understood—in no way delimits the

scope of Congress' authority to enact legislation to address problems of age discrimination in light of Congress' informed judgment as to the nature of those problems.

In *Murgia*, the Court did not have before it a record—or any means to *compile* a record—as to whether "the aged . . . have . . . experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." 427 U.S. at 313. In contrast, "extensive factfinding undertaken by the Executive Branch and Congress," *Wyoming*, 460 U.S. at 230-31, now has enabled Congress to make precisely the findings this Court was unable to make in *Murgia*. Employment actions that harm older workers, Congress has found, *are* "based in part on stereotypes unsupported by objective fact," *Wyoming*, 460 U.S. at 231, and "the available empirical evidence demonstrate[s] that arbitrary age lines [a]re in fact generally unfounded and that, as an overall matter, the performance of older workers [i]s at least as good as that of younger workers," *id.*

This is not to say that Congress having done what it has done, courts are obliged to apply heightened scrutiny to classifications based on age (although the point might be argued). Rather, it is to say that there is a fundamental distinction between the limits of *direct judicial equal protection scrutiny* of state laws, on the one hand, and the limits of *Congressional equal protection enforcement authority* on the other. It is within the Constitution's contemplation that when Congress brings its "specially informed legislative competence," *Katzenbach v. Morgan*, 384 U.S. at 656, to bear on a subject that is within the purview of the Equal Protection Clause, Congress quite properly can

arrive at conclusions and solutions the courts could not devise on their own.[24]

4. As we have shown, arbitrary and invidious discrimination violates the Equal Protection Clause, and the provisions of the ADEA are directed at such discrimination. *See supra* at 27-31. Thus there is every "reason to believe that many of the [employment actions] affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532. That is indeed an understatement. On that basis alone, the statute must be sustained as a permissible exercise of Congress' § 5 power.

The ADEA's focus, moreover, assures the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" called for by *City of Boerne*, 521 U.S. at 520. [25] Because the ADEA

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[24] Thus, the fact that the ADEA may invalidate certain state laws that would not be found by the courts to violate the Equal Protection Clause does not suggest that Congress has exceeded its § 5 authority. Having determined after extensive factfinding that employers in both the public and private sectors often rely on arbitrary stereotypes regarding older workers, it was well within Congress' power to require that, even where state statutes are involved, a State that wishes to make employment decisions on the basis of age should be "require[d] . . . to achieve its goals in a more individualized and careful manner than would otherwise be the case." *Wyoming*, 460 U.S. at 239. *See also Johnson v. Mayor and City of Baltimore*, 472 U.S. at 360-61.

[25] The measured nature of what Congress has undertaken in the ADEA can be illustrated by noting that *Murgia*, *Vance* and *Gregory* all would, or at least might, produce the same result under the ADEA as this Court reached under the Equal Protection Clause. In *Gregory*, the Court held that the challenged provision did not violate the ADEA, due to the Act's exception for "appointee[s] on the policymaking level." *See* 501 U.S. at 467, 465, 470. *Murgia* involved police positions, which presently are subject to a statutory exception applicable to many jurisdictions. *See* § 4(j), 2 U.S.C. § 623(j). Prior to the enactment of that exception, several courts

prohibits only discriminatory practices that are *not* based on a "reasonable factor other than age" and do *not* fall into any of the other statutory exceptions, *see supra* at 4-5, conduct that violates the Act is conduct of the kind that is likely to violate the Equal Protection Clause as well.[26] And, to the extent that the ADEA may subject state employers to liability in some instances for conduct that would not be found to violate the Equal Protection Clause, the statutory scheme falls well within "the power [of Congress under § 5] to . . . define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations," *J. A. Croson Co.*, 488 U.S. at 490 (opinion of O'Connor, J.) (emphasis in original).[27]

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had sustained mandatory retirement of public safety officers under the ADEA's exception for bona fide occupational qualifications. *See* 8 L. Larson, *Employment Discrimination* § 131.06 at 131-19-20 (2d ed. 1999) (collecting cases). Finally, mandatory retirement provisions for foreign service officers, similar to those at issue in *Vance*, continue to be lawful notwithstanding the enactment of the ADEA. *See Strawberry v. Albright*, 111 F.3d 943, 947 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 1164 (1998). *See also Vance*, 440 U.S. at 97 n.12 (noting that when Congress amended the ADEA in 1978, it "preserved the Foreign Service provision, at least for the time being, to allow the appropriate international relations committee to study the issue").

[26] It bears noting in this regard that even the disparate impact theory of liability, assuming *arguendo* that it is available under the Act, *see supra* note 20, is subject to the "reasonable factors" defense, *see supra* at 4, and thus, in the end, "is designed as a means to detect employment decisions that reflect 'inaccurate and stigmatizing stereotypes.'" *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1080 (7th Cir. 1994) (Cudahy, J., dissenting), *cert. denied*, 515 U.S. 1142 (1995), quoting *Hazen Paper Co.*, 507 U.S. at 610. *See also Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661 (1989) (noting that proof of the elements of a disparate impact claim "would belie a claim by [employers] that their incumbent practices are being employed for nondiscriminatory reasons").

[27] Indeed, the ADEA is substantially more closely linked to remedying constitutional violations than several statutes that have

In sum, the ADEA "can[] be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. Congress therefore had authority under § 5 of the Fourteenth Amendment to authorize suits by employees against State employers for violations of the Act.

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been upheld by this Court as permissible exercises of Congress' § 5 power. Under the Voting Rights Acts, the Court has sustained provisions that flatly prohibit state and local laws having a discriminatory impact, without allowing the State or local government any opportunity to defend those laws as serving a nondiscriminatory purpose. *City of Rome*, 446 U.S. at 175-77; *Lopez v. Monterey County*, 119 S. Ct. 693, 703 (1999). The Court also has sustained Congress' power to require "preclearance" of any change in voting practices in a jurisdiction covered by the Voting Rights Act of 1965, even if the change was dictated "by [a] State[ ] and ha[s] not been designated as [a] historical wrongdoer[ ] in the voting rights sphere." *Id.* In *Katzenbach v. Morgan*, one of the grounds on which this Court sustained a ban on literacy tests that operated to deny the vote to many members of New York City's Puerto Rican community was that, separate and apart from whether the legislation was "aimed at the elimination of an invidious discrimination in establishing voter qualifications," 384 U.S. at 653-54, Congress could act under § 5 to provide the Puerto Rican community with "enhanced political power [that] will be helpful in gaining nondiscriminatory treatment in public services." *Id.* at 652. *See City of Boerne*, 521 U.S. at 528 (reaffirming that rationale). And in *Maher v. Gagne*, 448 U.S. 122 (1980), this Court upheld Congress' power under § 5 to require States to pay attorneys' fees in cases alleging constitutional claims in which the plaintiff has obtained a favorable disposition, even if "the plaintiff prevails [only] on a wholly statutory, non-civil-rights claim." *Id.* at 132.

CONCLUSION

The decision of the Court of Appeals should be reversed.

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